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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/541,111	06/30/2005	Stefan Bruening	C 2347 PCT/US	6131
23657	7590	08/28/2009		
FOX ROTHSCHILD LLP 2000 MARKET STREET PHILADELPHIA, PA 19103				
EXAMINER				
CORNO JR, JAMES A				
ART UNIT		PAPER NUMBER		
1793				
NOTIFICATION DATE		DELIVERY MODE		
08/28/2009		ELECTRONIC		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

ipdocket@foxrothschild.com

Office Action Summary

Application No.

10/541,111

Applicant(s)

BRUENING ET AL.

Examiner

JAMES CORNO

Art Unit

1793

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 03 June 2009.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 24, 26 and 28-52 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 24, 26 and 28-52 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/S508)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

DETAILED ACTION

Response to Arguments

Applicant's arguments, see page 8, filed June 3, 2009, with respect to the rejection of claims 24-26, 28, and 29, have been fully considered and are persuasive. The rejection of claims 24-26, 28, and 29 over Niendick has been withdrawn.

Regarding applicant's assertion that the teachings of Fogel apply only to esters, the quoted passage indicates only that an ideal physical property of cosmetics (i.e. a melting point near body temperature) had been difficult to achieve in esters. There is no implication that the physical properties are not similarly desirable in other oily/waxy cosmetic substances.

Regarding applicant's assertion that Bucheler's phase inversion is not involved in the claimed process, it should be noted that the process as claimed does not exclude a phase inversion. Bucheler's process is therefore still applicable.

The new rejections presented below were necessitated by the amendment requiring a minimum of 10% wax phase and a maximum melting point. The rejections are therefore made final.

Claim Rejections - 35 USC § 112

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Claims 36-43 and 52 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. The addition of the limitation "based on the wax phase" to elements (1), (2), (3), and (4) of claim 36 contradicts the rest of the specification and the original wording of claim 36 itself, which clearly indicates that all percentages were based on the full dispersion and not just the wax phase. The amendment places new lower limits on the components, and there is no support in the specification for the changes.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 24-43 and 51-52 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ansmann et al. (US Patent No. 6,365,168) in view of Fogel (US Patent No. 5,840,285). Ansmann teaches a wax dispersion with particles 12-14 μm in diameter (col. 2, line 20) in which the wax phase comprises a dialkyl ether, an emulsifier, and water (claim 7). Ansmann teaches that the dispersion should preferably contain 0.5-2% dialkyl ether, 1-2% cationic polymer, 5-25% emulsifier (col. 6, lines 5-9),

and 5-40% additives (col. 9, lines 22-24), all of which are considered part of the wax phase according to the instant specification. That gives a wax phase component of 11.5-69%, which falls within the claimed range. Ansmann does not teach that the wax phase has a melting point between 25 and 50 °C. Fogel teaches that cosmetic solids ideally melt at body temperature (37 °C; col. 1, lines 26-27), which falls within the claimed range. It would have been obvious to one of ordinary skill in the art at the time of the invention to select the ideal melting point for the solid phase of the composition.

Regarding claim 26, Ansmann teaches the use of nonionic surfactants (emulsifiers).

Regarding claim 28, Ansmann teaches a particle size of 12-14 μm .

Regarding claim 29, it is assumed that the components used by Ansmann are essentially pure and are, therefore, free of water.

Regarding claims 30 and 31, Ansmann teaches that the composition may also include additional oil or wax components, including triglycerides (col. 6, lines 33-54; col. 8, lines 1-21).

Regarding claims 32 and 33, Ansmann teaches that the composition includes a cationic polymer such as cellulose derivatives (polysaccharides; col. 2, lines 21-23).

Regarding claim 34, Ansmann teaches that the composition may include active components (col. 6, lines 24-32).

Regarding claim 35, Ansmann teaches that the composition may include glycerol or propylene glycol (col. 8, lines 56-58), both of which are humectants.

Regarding claim 36, Ansmann teaches that the dispersion should preferably contain 0.5-2% dialkyl ether, 1-2% cationic polymer, 5-25% emulsifier (col. 6, lines 5-9), and 5-40% additives (col. 9, lines 22-24), all of which are considered part of the wax phase according to the instant specification. That gives a wax phase component of 11.5-69%, which overlaps the claimed range, with the balance water. Ansmann also teaches that the additives may include oils, superfatting agents, and waxes (col. 6, lines 24-32).

Ansmann and the claims differ in that Ansmann does not teach the exact same composition ranges as recited in the instant claims.

However, one of ordinary skill in the art at the time the invention was made would have considered the invention to have been obvious because the ranges taught by Ansmann overlap the instantly claimed ranges and therefore are considered to establish a prima facie case of obviousness. It would have been obvious to one of ordinary skill in the art to select any portion of the ranges disclosed in the prior art reference, including the instantly claimed ranges, particularly in view of the fact that;

"The normal desire of scientists or artisans to improve upon what is already generally known provides the motivation to determine where in a disclosed set of percentage ranges is the optimum combination of percentages", In re Peterson 65 USPQ2d 1379 (CAFC 2003).

Also, In re Geisler 43 USPQ2d 1365 (Fed. Cir. 1997); In re Woodruff, 16 USPQ2d 1934 (CCPA 1976); In re Malagari, 182 USPQ 549, 553 (CCPA 1974) and MPEP 2144.05.

Regarding claims 37 and 38, Ansmann teaches 0.1-5% cationic polymer such as modified cellulose (a polysaccharide).

Regarding claim 39, body temperature falls within the claimed range.

Regarding claim 40, Ansmann teaches a particle size of 12-14 μm .

Regarding claim 41, it is assumed that the components used by Ansmann are essentially pure and are, therefore, free of water.

Regarding claim 42, Ansmann teaches that the composition may include active components (col. 6, lines 24-32).

Regarding claim 43, Ansmann teaches that the composition may include glycerol or propylene glycol (col. 8, lines 56-58), both of which are humectants.

Regarding claims 51-52, Ansmann teaches that the composition may be used as a body care preparation (col. 6, lines 24-32).

Claims 44-50 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ansmann in view of Fogel as applied to claim 24 above, and further in view of Bücheler, et al. (U.S. Patent No. 4,996,004). Ansmann in view of Fogel teaches the claimed dispersion, including the use of a polymer, but it fails to teach the claimed production method. However, Bücheler teaches a preparation method for stable cosmetic dispersions of organic substances in water with fine particle size control. This preparation method consists of (1) creating a preliminary emulsion of melted wax and water and (2) spraying this preliminary emulsion into a cooling tank filled with water below the melting point of the solid (col. 5, lines 42-58). Bücheler also teaches that this

method confers several efficiency advantages over convention homogenizers. It would have been obvious to one of ordinary skill in the art at the time of the invention to use the method of Bücheler to produce the composition of Ansmann in order to maximize process efficiency while producing a stable cosmetic preparation.

Regarding claim 45, Bücheler teaches a homogenization step for the pre-emulsion prior to introduction to the cooling tank (col. 3, lines 56-68).

Regarding claim 46, Bücheler teaches a cooling step for the pre-emulsion before adding it to the cooling tank (col. 6, lines 7-11).

Regarding claim 47-48, Bücheler teaches the addition of the desired emulsifier to the pre-emulsion before addition to the cooling tank (col. 5, lines 42-58). Ansmann teaches the use of a polysaccharide as the emulsifier (col. 8, lines 25-34).

Regarding claim 49, Bücheler teaches the use of a pressure nozzle for homogenization.

Regarding claim 50, the claimed ranges are anticipated by anticipated by Ansmann.

Conclusion

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to JAMES CORNO whose telephone number is (571)270-5829. The examiner can normally be reached on Monday-Thursday 9:30am-5:00pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Melvin Curtis Mayes can be reached on 571-272-1234. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/JAMES CORNO/
Examiner, Art Unit 1793

August 21, 2009

/Melvin Curtis Mayes/
Supervisory Patent Examiner, Art Unit 1793